

BUPINDER SINGH AVATAR SINGH & ANOR

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v.

PHILEOALLIED BANK (M) BHD

HIGH COURT MALAYA, KUALA LUMPUR

b

RK NATHAN J

[ORIGINATING SUMMONS NO: S2-24-290-1998]

14 OCTOBER 1998

LAND LAW: *Sale of land - Loan facility - Assignment of property by borrower to financier - Strata title not issued - Power of attorney executed - Whether assignment absolute - Whether assignor has unfettered right to sell property pursuant to power of attorney - Whether proper procedure was to proceed under O. 31 of Rules of the High Court 1980 - Whether to proceed under O. 83 - Validity of power of attorney - Certificates of authentication*

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BANKING: *Securities for advances - Assignment - Recovery of loan - Assignment of property by borrower - Strata title not issued - Power of attorney executed - Whether assignment absolute - Whether bank has unfettered right to sell property pursuant to power of attorney - Whether proper procedure was to proceed under O. 31 of Rules of the High Court 1980 - Whether to proceed under O. 83 - Validity of power of attorney - Certificates of authentication*

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The plaintiffs had entered into a loan agreement cum assignment ('the LACA') with the defendant bank on 3 January 1996 for the purpose of financing their purchase of a piece of property ('the property') for which no strata title had been issued. The plaintiffs had also executed instruments of power of attorney. Upon the plaintiffs' default in making the monthly repayments, the defendant demanded the repayment of the entire loan facility. Subsequently, the defendant took steps to sell the property by public auction on 9 April 1998 without giving notice to the plaintiffs, although there was a newspaper advertisement on 26 March 1998. The plaintiffs then applied for an injunction to prevent the defendant from disposing of the property, contending that since the assignment of the property constituted an absolute assignment of the rights of a borrower to a financier, the proper procedure was for the defendant to proceed under O. 31 of the Rules of the High Court 1980 ('the RHC'). Alternatively, it was argued that if the court was to hold that the assignment was not absolute, then the defendant ought to have proceeded under O. 83 of the RHC. The defendant argued that whilst the security documents were binding on the parties, it had an unfettered right to auction the property pursuant to the powers granted it by the power of attorney.

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a Held:

- b** [1] The LACA was signed on 3 January 1996. The power of attorney was deemed to have been given on that same day but the certificates of authentication for the power of attorney were dated 31 October 1995 and 3 September 1995 respectively. That notwithstanding, the preamble of the power of attorney already made reference to the LACA, which at the time the certificates of authentication were issued, was not even in existence. This created doubts as to the validity of the power of attorney.
- c** [2] When there is an absolute assignment of rights by a borrower to a financier, and no title has been issued, the proper procedure for the financier to take in selling the property would be to commence proceedings under O. 31(1) of the RHC (*Raju Jayaraman Kerpaya v. Chung Khiaw Bank Ltd*).

d Obiter:

- e** [1] Even if the security documents did not create an absolute assignment, they would have created an equitable charge. In this event, the appropriate procedure to be adopted by the financier would be to commence proceedings under O. 83 of the RHC (*Malayan Banking Bhd v. Zahari Ahmad*).

[Plaintiff's application allowed.]

Case(s) referred to:

- f** *Chung Khiaw Bank Ltd v. Hipparion (M) Sdn Bhd* [1988] 1 CLJ 164 (**refd**)
Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd [1989] 2 CLJ 101 SC (**refd**)
Malayan Banking Bhd v. Zahari Ahmad [1988] 2 MLJ 135 (**refd**)
Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56 FC (**refd**)
Raju Jayaraman Kerpaya v. Chung Khiaw Bank Ltd [1997] 3 CLJ 216 (**foll**)

g Legislation referred to:

Civil Law Act 1956, s. 4(3)
Rules of the High Court 1980, O. 31(1), O. 83
Specific Relief Act 1950, s. 41

For the plaintiffs - Alex Nandaseri de Silva; M/s V Pury & Bala

- h** *For the defendant - Ting Heng Peng; M/s Amin-Tan & Co*

Reported by Farah Naim

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JUDGMENT

RK Nathan J:

Facts

The plaintiffs entered into a sale and purchase agreement on 12 November 1994 with Phileo Promenade Sdn Bhd (the developer) for the purchase of the subject property at a price of RM449,100. To assist the plaintiffs to finance the purchase the defendant agreed to grant a loan by way of a letter of offer dated 17 March 1995. Subsequently a Loan Agreement Cum Assignment (LACA) was signed on 3 January 1996. Both the plaintiffs executed instruments of power of attorney. The 1st plaintiff executed the same on 31 October 1995 whereas the 2nd plaintiff executed the same on 3 September 1995. The said instruments of power of attorney state expressly that they were given on 3 January 1996. Further the said instruments of power of attorney state in their preamble as follows:

WHEREAS

This Power of Attorney is made pursuant to a Loan Agreement cum Deed of Assignment ...

It is a fact that the monies under the loan facility granted to the plaintiffs were disbursed subsequently to the developer. The developer then by way of a letter dated 15 July 1997 notified the plaintiffs that they could obtain delivery of vacant possession of the said property.

Subsequently the defendant through its solicitors wrote to the plaintiffs on 11 November 1997 stating that the plaintiffs had breached the said LACA by failing to make the monthly repayments amounting to RM18,563.58 as at 30 September 1997. In the circumstances, the defendant demanded the repayment of the entire loan facility granted amounting to RM376,190.37. The defendant's letter concluded with the warning that if the said sum was not paid within seven (7) days legal proceedings would be commenced.

By a subsequent letter dated 31 December 1997 the defendant through its solicitors gave notice that the defendant was terminating the plaintiffs' licence to occupy the said property and demanded delivery of vacant possession of the said property within seven (7) days as the defendant intended to commence proceedings to sell the property in order to recover the debt due from the plaintiffs under the facility.

It is a fact that the defendant did not commence any legal proceedings against the plaintiffs for the recovery of the monies due under the facility, or for the sale of the said property.

- a* The defendant then took steps to sell the said property by way of a public auction on 9 April 1998 at a reserve price of RM450,000. In any case no notice of this intended public auction was served on the plaintiffs, but an advertisement to this effect was taken out in "The Star" newspapers on 26 March 1998.
- b* It is also a fact that to date no strata title has been issued in respect of the said property.

Plaintiffs' Claim

- c* The plaintiffs then filed an originating summons (encl. 1) against the defendant for various declarations and an injunction to prevent the defendant whether by its agents and/or servants from selling and/or transferring by way of public auction, or otherwise from disposing of, the said property.
- d* Having obtained an *ex parte* order for the said injunction, the plaintiffs then came before me on the *inter partes* hearing of the said application for an injunction as prayed for, in the originating summons.
- e* The plaintiffs contended that since the security documents for granting the loan were the LACA and the two instruments of power of attorney, based on decided authorities, since the assignment in this case constituted an absolute assignment of rights of a borrower to a financier where there is no title issued, the appropriate procedure that the defendant ought to have adopted was to commence proceedings under O. 31 of the Rules of the High Court 1980 (the RHC).
- f* Alternatively if the court was to hold the assignment as not an absolute assignment then the defendant ought to have commenced proceedings under O. 83 of the RHC.

Case For The Defence

- g* Whilst conceding that the security documents binding the parties are as stated by the plaintiffs, the defendant argued that it had an unfettered right to proceed to auction the land pursuant to the powers granted to it under the power of attorney.

Findings Of The Court

- h* It is obvious that the security documents for the facility granted by the defendant to the plaintiffs are the LACA and the two instruments of power of attorney.
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However, I note that the LACA was signed on 3 January 1996. The power of attorney by the plaintiffs to the defendant was deemed to have been given on 3 January 1996 but the Certificates of Authentication of the said power of attorney are dated 31 October 1995 and 3 September 1995 respectively. However, the preamble to the power of attorney already makes reference to the LACA which at the time the Certificates of Authentication were issued, was not even in existence. This to my mind creates a doubt as to the validity of the two instruments of power of attorney.

The Assignment

It is pertinent to ascertain what was assigned by the plaintiffs to the defendant under the LACA. The Federal Court in *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1981] 1 CLJ 56; [1984] 2 MLJ 268 FC held that whether or not an agreement is an absolute assignment or by way of charge only within the meaning of s. 4(3) of the Civil Law Act 1956 was to be gathered from within the four walls of the document concerned. The relevant clause relating to the assignment in the LACA is cl. 8. It reads as follows:

8. ASSIGNMENT

For the consideration aforesaid the Borrower hereby absolutely assigns to the Bank the full and entire of the Borrower's benefits rights title and interest in and to and under the Sale Agreement and in the said Property together with the Borrower's right of enforcement thereof or thereunder PROVIDED ALWAYS that notwithstanding the Assignment hereinbefore contained or any other provision of this Assignment the Borrower shall and hereby undertakes to continue to observe perform and be bound by all whatsoever conditions covenants and stipulations therein on the part of the Borrower expressed and contained in the Sale Agreement.

Applying this principle the High Court in *Chung Khiaw Bank Ltd v. Hipparion (M) Sdn Bhd* [1988] 1 CLJ 164; [1986] 2 MLJ 62 interpreted the security documents which comprised of the loan agreement and the deed of assignment, as being security relating to a chose in action, that is to say an assignment of the defendant's rights, benefits and interest in and under the sale agreement of the property to wit a parcel of a sub-divided building, strata title in respect of which, was yet to be issued. The High Court held that it had jurisdiction under s. 41 of the Specific Relief Act 1950 and/or that it had the inherent jurisdiction to grant the declaration prayed for and granted the plaintiff order for sale of the property. On appeal the then Supreme Court in *Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd* [1989] 2 CLJ 101 SC; [1989] 2 MLJ 149 SC upheld the trial judge's decision and confirmed the finding that the deed was an absolute assignment and not purporting to be by way of charge only

- a* within the meaning of s. 4(3) of the Civil Law Act 1956 because of the use of the word “absolutely”. The Supreme Court however did not deal with the question as to whether the assignment therein was an absolute assignment creating a security relating to a chose in action, or a security relating to land as contemplated by the trial judge. The saga of *Hipparion (supra)* did not end with the decision of the Supreme Court. The Supreme Court having held that the deed of assignment of the subject property was absolute in nature and not by way of charge only, the proceeds from the sale of the subject property were insufficient to meet Hipparion’s liability to Chung Khiaw Bank in full. The bank therefore sued the guarantor upon the guarantee. That was the case of *Raju Jayaraman Kerpaya v. Chung Khiaw Bank Ltd* [1997] 2 MLJ 590.
- c* The Court of Appeal held that the findings by the courts at all levels in the *Hipparion* proceedings that the deed of assignment was absolute and not by way of charge was made only in the context of the procedure adopted by the bank to effect a sale of the subject property. The Court of Appeal went on to hold that the decision of the Supreme Court in the *Hipparion* proceedings did not hold that the debt owed by *Hipparion* had been extinguished by the absolute assignment it gave the bank. In fact the Court of Appeal held at p. 595:
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- e* When Hipparion failed to meet its obligations under the loan agreement, the respondent had to take such steps as were necessary to recover the principal and interest. The procedure prescribed by O. 83 of the Rules of the High Court 1980 (‘the RHC’) did not apply to the fact pattern because there was neither a registered nor an equitable charge. The appropriate procedure was that made available by O. 31 of the RHC. And that is the procedure that was resorted to by the respondent and sanctioned by the Supreme Court.

- f* Much as it is not my duty at this stage to make any positive findings I am constrained, in the light of clear and manifest authorities of both the superior courts, to hold that when there is an absolute assignment of rights by a borrower to a financier, where there is no title issued, the appropriate procedure to be adopted by the financier to sell the property concerned would be to commence proceedings under O. 31(1) of the RHC, which reads:
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1 Power to order sale of immovable property

- h* Where in any cause or matter relating to any immovable property it appears necessary or expedient for the purposes of the cause or matter that the property or any part thereof should be sold, the court may order that property or part to be sold, and any party bound by the order and in possession of that property or part, or in receipt of the rents and profits thereof, may be compelled to deliver up such possession or receipt to the purchaser or to such other person as the court may direct.

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Assignment By Way Of A Charge

Even if I were to hold that the security documents do not create an absolute assignment which I hasten to add, I do not so find, it is my judgment that in such an event, the security documents would in any case, create an equitable charge. If that be the case, then the appropriate procedure to be adopted by the financier in this case would be to commence proceedings under O. 83 of the RHC (see *Malayan Banking Berhad v. Zahari bin Ahmad* [1988] 2 MLJ 135).

In the circumstances I grant an order in terms of prayers (3), (6), (7) and (8) of the plaintiffs' application with costs.

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